and "sons" cannot apply to "adopted children" and "adopted sons".

In the cases in which the term "children" has been held to include "adopted children" there is in the will an intention expressed by the testator or necessarily implied from the wording of the will or surrounding circumstances that the testator intended in using the word "children" to include "adopted children". In the present case there is nothing in the will and surrounding circumstances to justify the extension of the word "child" or "children" to include "adopted children". The question is answered accordingly.

Parties to have costs out of Estate.

Order Accordingly.

H. A. BERNEY v. TRONOH MINES LIMITED.

[Orig. Civil Juris. (Evans, J.) November 19, 1947]
[Ipoh — Civil Suit No. 30 of 1947]

Contract of service — Frustration by Japanese invasion of Malaya.

In this case the plaintiff sued for breach of contract of service. On the invasion of Malaya by the Japanese forces the European staff of the Defendant Company was evacuated from Tronoh, Tanjong Tuallang and other places but the plaintiff elected to remain at Tanjong Tuallang. The Defendants contended that consequent on the Japanese occupation of Perak, the contract of employment between them and the plaintiff was discharged by frustration.

Held, that the invasion of Malaya by the Japanese frustrated the performance of the contract and therefore there was no breach of contract by the Defendants.

Cases referred to:—

(1) *Denny, Mott and Dickson Ltd. v. James B. Fraser & Co. Ltd.* (1944) A.C. 274.

(2) *Hirji Mulji's* case (1926) A.C. 497.

CIVIL SUIT.

M. S. Mahendran for the Plaintiff.

J. M. M. Lewis for the Defendants.

Evans, J. : — In this case the plaintiff sues for breach of contract. Although he does not definitely allege breach, certain of the items in his claim are in law based upon breach of contract. He alleges a contract of service with the defendants made verbally on the 30th September, 1939, under which he was entitled to a salary of $345/- per month, the contract was terminable by 3 months' notice, and he was entitled to leave on full pay for a period of 6 months, after a period of service not specified in the statement of claim, together with the cost of a passage to Europe. His employment with the defendants qualified him to contribute to the Malayan Tin and Rubber Provident Fund. He did so contribute, and further claims from the defendants the return of the amount of his contribution. He alleges that in December 1941 the European staff of the defendant company, including the General Manager, left Tronoh and Tanjong Tuallang and that he, the plaintiff, remained behind. This is presumably intended as pleading a breach of contract by the company upon which 3 months' salary is claimed as due to him as such salary would only be payable for breach of contract of service. The defendants denied the contract as alleged, and stated that the plaintiff had been employed by the company on a monthly agreement at the salary stated which carried with it none of the additional terms alleged, that the contract had been terminated by frustration, that there was in law no breach of contract, and that the amount of contribution to the Fund was reclaimable by the plaintiff personally from that Fund over which the defendants had no sort of control.

The only witnesses called were the plaintiff and Mr. John Gordon, the General Manager of the defendant company. The plaintiff failed to prove the contract as pleaded and in fact stated that he was engaged on a monthly basis on the date mentioned in the statement of claim, but that a year later he was given an opportunity of joining the Malayan Tin and Rubber Provident Fund, to which he contributed 10% of his salary and his employers another 10%. He then asked Mr. Biddick, the local Manager, for a contract and was told that he would get the same terms as the others, by which he understood that he was to have leave pay and passage and the 3 months' notice. But he did not call Mr. Biddick as a witness. The plaintiff further relied on a letter of the 8th April, 1947, from the defendants' solicitor to the Vice-Consul of Switzerland, the fourth paragraph of which reads as follows :—

> Without prejudice, however, our clients are willing to pay to him (the plaintiff) the whole of his salary for December 1941, together with the amount of his own contributions to the Malayan Tin and Rubber Provident Fund.

No other evidence was given to suggest that the defendants were in any way responsible for the contributions to the Provident Fund.

The plaintiff admitted that he received orders to evacuate from Tanjong Tuallang and refused to do so. He stated that he then wrote a letter saying that he would stay behind and look after the property, and later on receipt of an order from an officer of the Mines Department made an offer to Mr. Biddick to

blow up the dredges. Neither offer was accepted. Mr. Gordon proved that orders were received for all the European staff to evacuate the Mines Department which was continually pressing him to effect the evacuation. It seems to have been carried out on the 22nd or 23rd December, 1941. On that occasion the plaintiff asked for his December salary which he did not receive, amounting to $345/-, which sum has now been paid into Court by the defendants.

Mr. Gordon gave evidence regarding the Malayan Tin and Rubber Provident Fund, that it is a Fund instituted by a number of employers, whose employees are eligible for membership without any special reference to the terms of their engagement. The management of the Fund is not vested in the company, and the company has no control over it. I accept his evidence absolutely, and it is clear that the plaintiff has no claim in respect of his contributions against his employer. The paragraph of the letter set out above might well be read as meaning that the employer would not raise any objections which might be open to him to the plaintiff's claim against the Fund. It certainly cannot make the employer liable for the payment of the plaintiff's contributions. It is not a contract, and does not profess to be, nor is there any consideration. The only way in which the wording of this paragraph could be strained to support a claim against the employer would be on the basis that it was a compromise, and this claim is clearly not brought on that basis. To anyone who is a member of the Fund, and with the knowledge which he must have, or might be supposed to have, of the rules, the paragraph could not possibly be misleading.

The rest of the claim depends upon the contract itself. As to this contract, Mr. Gordon gave evidence that the plaintiff was, as he himself says, engaged upon a monthly basis. He denied that the contract was in any way afterwards varied by the company. He further stated that the terms claimed by the plaintiff were normally incorporated in contracts made with persons engaged outside this country, but that contracts made in this country were usually on a monthly basis, and moreover that, after the war began, the Directors ordered him to make all engagements subject to a month's notice. He further stated that the plaintiff's engagement was for a purely temporary purpose, to replace permanent servants of the company who, being British subjects, had been called up for war duty. I accept that evidence as a perfectly truthful account of the defendant company's understanding of the position both then and now. It is in accordance with ordinary practice and with what might be expected. There is no apparent reason why the company engaging a man in this country should undertake to transport him elsewhere. The contract alleged, which contemplates service for a period which would entitle him to 6 months' leave, is obviously a contract the probable duration of which must be some years. It is one which, in English law, would have to be in writing. It may be that that law does not apply here, but I refer to it because it is based on reasonable practice and custom. The plaintiff bases his contract on some passing words with the local Manager. It is not proved that this man is authorised to enter into any such contract, and if plaintiff wishes to suggest that he was held out by the company as an apparent agent, it is obvious that far more and better evidence would be required than that which the plaintiff has called. He has not called Mr. Biddick, and on the evidence before me, I can only say that he was employed upon a monthly basis. The question remains of whether that contract of service was broken by the company or was terminated by frustration. In the case of *Denny, Mott and Dickson, Ltd. v. James B. Fraser & Co. Ltd.*[1] Lord Wright in his judgment says :—

> It is now I think well settled that where there is frustration a dissolution of a contract occurs automatically. It does not depend, as does rescission of a contract on the ground of repudiation or breach, on the choice or election of either party. It depends on what actually has happened on its effect on the possibility of performing the contract. Where, as generally happens, and actually happened in the present case, one party claims that there has been frustration and the other party contests it, the court decides the issue and decides it ex post facto on the actual circumstances of the case. The data for decision are, on the one hand, the terms and construction of the contract, read in the light of the then existing circumstances, and on the other hand the events which have occurred. It is the court which has to decide what is the true position between the parties..... In **Hirji Mulji's case**[2], about seven years later, his analysis is more exact and penetrating, but he again emphasizes that, when frustration occurs, it is automatic, and that its legal effect depends not on the intention of the parties or even on their knowledge as to the event, but on its occurrence in such circumstances as to show it to be inconsistent with the further prosecution of the adventure. I mention these two aspects of the principle here because they are important for the decision of the present case. The event is something which happens in the world of fact and has to be found as a fact by the judge. Its effect on the contract depends on the meaning of the contract, which is a matter of law. Whether there is frustration or not in any case depends on the view taken of the event and of its relation to the express contract by "informed and experienced minds". What the event was in the present case is not in controversy.

The event pleaded by plaintiff apparently, though not expressly, as a breach is that "On the invasion of this country by the Japanese forces in December 1941, the European staff of the defendant company, including the General Manager, evacuated from Tronoh, Tanjong Tuallang, and other places, but the plaintiff, being a Swiss national, remained at Tanjong Tuallang." The defendants plead that "On the Japanese occupation of Perak in December 1941 the contract of employment between the defendants and the plaintiff was discharged by frustration." The defendants offered no proof of the event but asked the Court to take judicial notice of the invasion. In fact, the general fact of the invasion is admitted in the pleading. I think, moreover, I am entitled to take judicial notice of the invasion, of its general course, of the policy pursued, and of orders generally given. I also refer under section 57, Evidence Enactment, to the official dates of Japanese occupation of relevant points, namely, Ipoh on 22nd December, Parit, Batu Gajah, and Kampar on 23rd. The exact date of evacuation is not pleaded, nor was it very definitely proved, but the evidence goes to shew that it was very shortly before the Japanese occupation of the place, and while the neighbourhood must have been in military occupation, and while active warfare was being conducted near by. In these circumstances, orders were issued by the military for evacuation, and certain property was destroyed. Orders came to the General Manager in this case through the Mines Department, the ordinary channel of their communication with Government, for evacuation and, as plaintiff himself avers, for the destruction of the dredges, the very property on which he was employed. Such orders might be expected to be enforced in case of default by the Army, to its hindrance in opposing the enemy. The defendant company is incorporated in England and its registered office is in London. Trading with the Enemy Regulations were made here in September 1939 and applied to Japan and to Japanese property in Malaya after her attack.

I am not satisfied that enemy invasion and no more can be relied upon as the event giving rise to frustration of every contract of service or otherwise performable in the invaded territory. Evacuation may be what is described in the cases on frustration as "self induced." I have accordingly set out the series of events and other facts constituting the relevant circumstances in which this contract terminated by breach or frustration. The contract is a month to month contract of service to work as a foreman of a shift on a dredge mining tin. The contract was made locally to be performed locally, and the plaintiff in fact refused to join the evacuation with the possibility of employment elsewhere. It seems to me that such a contract must depend upon the continued possibility of the defendant, a London company, to mine tin in Tanjong Tuallang. The military occupation of that place by an enemy in South East Asia War, with its known effects on commercial relation, would maim the company and sever its business connections. The integrity of the company required evacuation. This invasion would necessarily frustrate, and did frustrate, the performance of that contract. This being so, there was no breach of contract by the defendants, and the plaintiff's case, as it is based on such breach, therefore fails. As the month of December's service had not then been completed, no wages were due in respect of that month. The defendants have paid into Court the December wages but without prejudice to the defence of frustration. The consequence of frustration is that the loss lies where it falls. There will, therefore, be judgment for defendants with costs.

Claim Dismissed.

S. B. PALMER v. A. S. RAJAH & OTHERS.

[Orig. Civil Juris. (Russell, J.) December 9, 1947]
[K.L. — Civil Suit No. 24 of 1947]

Libel — Article in newspaper — Defence of fair comment — Damages.

In this case the plaintiff claimed damages for libel. The libel was alleged to be contained in an issue of the Malaya Tribune and in an issue of the Sunday Tribune. The plaintiff alleged that by reason of the said articles the Defendants meant and were understood to mean (1) that the plaintiff had acted in a way unbecoming of the President of the United Planting Association of Malaya and unbecoming to a man concerned in public affairs in that he had staged a walk-out during the course of a meeting between the representatives of the United Planting Association of Malaya and the representatives of the Central Committee of the Selangor Indian Estate Workers Trade Unions; (2) that he had abandoned negotiations which it was his duty or which he had undertaken to assist and conduct and that such negotiations were indefinitely postponed; (3) that by reason of his conduct at the said meeting he with others had been accused by the Commissioner of Labour, Malayan Union, of being unco-operative and that the Commissioner of Labour had described such attitude as deplorable; (4) that he was an irresponsible person unsuited to hold his position as President of the United Planting Association of Malaya or any other public position; and (5) that he was intolerant and impatient of criticism. The defence was that neither of the articles bore or was understood to bear or was capable of bearing or being understood to bear any of the alleged meanings or any other defamatory libellous or actionable meaning and that in their natural and ordinary meanings the articles were not libel. Further that in so far as the articles consist of statements of facts they were